

WHY CERTIFICATES ARE VALUABLE - WHAT NEEDS TO BE DONE

Occupational licensing and employment laws regulate many professions as well as unskilled and semi-skilled occupations. Examples of regulated occupations include barbers/cosmetologists, healthcare professionals, engineers, embalmers, waste management workers, real estate professionals, accountants, contractors, security guards, and many others. The statutory requirements for obtaining occupational licenses vary among the states and according to the type of license. Generally, however, occupational licensing statutes have two types of requirements: competency and character.

Although individuals with criminal records may be able to fulfill the competency requirement through training, experience, or education, the character component creates a more difficult obstacle. Under many licensing laws, a felony conviction is an automatic disqualification. In other instances, a felony conviction is evidence of the lack of "good moral character" which may also be a disqualifier. No matter how old their convictions record or how qualified they are for the job or license, these individuals are blocked from entering those occupations.

In the last 10 years Montana has released approximately 27,000 individuals from prison¹ (Montana averages approximately 10, 200 individuals in community corrections per year.²) These numbers do not account for those released from Federal Prison or are under Federal supervision. Nationally over 600,000 individuals are released from state and federal prisons each year, nearly two-thirds are rearrested within three years of their release. Most experts agree that employment is key to the successful reintegration of people with criminal records, and thus critical to reducing recidivism and promoting public safety. In the absence of employment, an individual is much more likely to commit another crime. The automatic bars to many types of employment and licensing only worsen the shortage of jobs for people with criminal records.

Certificates of rehabilitation offer a way to make those individuals employable and help them reintegrate into society. Several States offer certificates of rehabilitation (or a similar mechanism) to remove occupational bars that prevent people with conviction records from being employed in certain occupations. The opportunity created by these certificates statutes and supporting re-entry programs and have resulted in an approximately 21% drop in recidivism³

In addition to encountering bars to employment and licensing, individuals with criminal records often face other barriers, such as in housing and education. Certificates of rehabilitation can also be used to lift these barriers as well.

The Value of Certificates of Rehabilitation

Certificates of rehabilitation benefit job seekers, employers, and the state in a number of ways:

¹ DOC Biannual reports 2000-2010

² DOC Biannual Report 2012 Page A-6

³ Corrections Studies DOJ, Corrections Today April 2005

- Employers retain their discretion to individually assess every applicant and do not have to forego an opportunity to hire qualified employees because of some federal, state, and local laws and regulations that exclude people with certain criminal records.
- Individuals with criminal records who have completed relevant job training and education programs can be eligible for those jobs.
- Criminal records remain accessible for law enforcement purposes.
- Certificates can offer a presumption of rehabilitation for job applicants--or at a minimum an individual's commitment to rehabilitation--and shift the burden to the employer and licensing agency to demonstrate that the individual is not suitable for the job or license sought.
- Certificates can provide clear guidance to occupational licensing agencies or employers when considering an applicant's suitability for a particular license or job. For example, New York and Illinois have enumerated in their laws the factors employers must consider when evaluating a job applicant with a criminal history. These factors include:
 1. the state's public policy of encouraging the employment of people with criminal records;
 2. the specific duties of the job;
 3. the bearing, if any, the criminal offense(s) will have on the applicant's fitness to perform such duties;
 4. the time elapsed since the conviction;
 5. the age of the job applicant at the time of the offense;
 6. the seriousness of the offense(s);
 7. any information regarding the applicant's rehabilitation and good conduct; and
 8. the safety and welfare of a specific individual or the general public.

Reduction of Liability

Negligence in Hiring

Negligent hiring is a claim made by an injured party against an employer based on the theory that the employer knew or should have known about the employee's background which, if known, indicates a dangerous or untrustworthy character. Montana is not immune from such claims.

Negligent Hiring

Although the Montana Supreme Court has discussed the tort of negligent hiring, retention and supervision, it has never explicitly recognized it or specified the elements a party would have to prove. See *Saucier ex rel. Mallory v. McDonald's Restaurants of Mont., Inc.*, 179 P.3d 481,494, 342 Mont.

29, 47 (Mont. 2008); *Hoffman v. Austin*, 147 P.3d 177, 181-82, 334 Mont. 357, 364-65 (Mont. 2006) (overruled on other grounds); *Stafford v. State*, 2004 Mont. 96N, ¶¶21 & 22 (Mont. 2004)

(non-cite opinion), citing Pablo v. Moore, 995 P.2d 460, 298 Mont. 393 (Mont. 2000). The Court recently referenced the claim, however, and stated in dicta that the plaintiff could have held the defendant liable by stating a claim for negligent hiring because it "fail[ed] its duty of due diligence to investigate the contractor before hiring ...

Also See

Peschel v. City of Missoula, 664 F. Supp. 2d 1149, 1168-69 (D. Mont. 2009).

Employer Liability for Negligent Hiring of Ex-Offenders – St Louis School of Law – Hickox

Negligence in Leasing

A recent judgment against the Charlotte (North Carolina) Housing Authority establishes a similar precedent with regard to tenant screening - which might be described as the negligent leasing theory. Under this negligent leasing theory, an injured party (employee, another resident or others) may bring an action against a landlord arguing that the landlord failed to exercise sufficient care in conducting background checks on prospective tenants. (\$132,000 Damage award)

In Montana this is a grey area as to the extent of liability and is not expressly eliminated by the Landlord Tenant Act. However based on the MT Supreme Court in Moore it is a heightened concern to Landlords.

Negligence in Admissions

This is a new liability arena with mixed case results, however the fear of potential liability is often more damaging than the actual liability potential. Elimination of the potential for liability and the massive reduction in recidivism rates from 60% to 0% creates a safer community as a whole while reducing costs of crime and incarceration.